Supreme Court, U.S.
FILED
MAY 28 2002
OFFICE OF THE CLERK

No. 01-1233

In The
Supreme Court of the United States

Christine Mato,
Petitioner,

v.

Jack Baldauf, Dr.; Jeff Fox, Dr.; Texas A&M University System; Texas A&M University; and Texas A&M University Ocean Drilling Program,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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P9512

QUESTION PRESENTED

Will the Court of Appeals for the Fifth Circuit be allowed to continue to circumvent this Court's holding in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), under the guise of insufficiency of the evidence by ignoring and discrediting evidence favorable to plaintiffs?

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REPLY TO BRIEF IN OPPOSITION

Petitioner Christine Mato ("Petitioner") has sought this Court's review of the United States Fifth Circuit Court of Appeals' ("Fifth Circuit") reversal of her jury verdict on the precise grounds that the Fifth Circuit has, again, contravened this Court's holding in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), under the guise of sufficiency of the evidence. Petitioner has complained that the Fifth Circuit has ignored and discredited the evidence favorable to Petitioner despite this Court's clear guidance and direct admonishment not to do so. Respondents have filed a brief in opposition which can only be characterized as arrogant. But it is an arrogance born of countless "victories" before the Fifth Circuit where, as argued in the Petitioner's original Petition ("Petition"), the default value is that the civil rights plaintiff loses.[1]

Respondents plead that this Court should not grant the Petition on two grounds. First, Respondents argue (factually) that Petitioner failed to put on sufficient evidence. However, Respondents, like the Fifth Circuit, fail to understand the standard of review as set out in *Reeves*, and do not consider the evidence favorable to the verdict. Respondents instead ignore, discredit, and spin it in a light unfavorable to Petitioner, and actually rely on a significant amount of evidence only favorable to Respondent.

After casting aside all of Petitioner's evidence, Respondents then contend that Petitioner's case is not worthy of review. In doing so, however, Respondents inadvertently demonstrate that this is precisely the type of case that merits this Court's attention. Respondents rely on the false hope that this Court's general rule against reviewing factual determinations will insulate the Fifth Circuit's blatant and habitual disregard of the standard of review in

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[1]Loss defined in practical terms meaning everything from total reversal of a trial victory to a decrease of damages to the point that the award could not possibly exceed the attorneys fees spent in prosecuting the case. See Section III of Petition.

such cases. However, it was just such a factual determination in *Reeves* which prompted this Court to admonish and reverse the Fifth Circuit. Indeed, whether the Fifth Circuit will be allowed to continue to circumvent *Reeves* is precisely the question presented by Petitioner. Respondents fail to counter Petitioner's argument that the Fifth Circuit has so routinely found against civil rights plaintiffs that their decisions have had (or should have) a chilling effect on the bringing of such cases in the circuit. Rather than point to numerous cases favorable to civil rights plaintiffs, Respondents have instead provided only a few cases, and the cases provided, when reviewed, actually favor granting the Petition.

I. Respondents Merely Endorse the Fifth Circuit's Erroneous Application Of The Evidentiary Standard In Discrimination Cases Proven Through Indirect Evidence

After claiming that Petitioner has made "numerous misstatements of fact," Respondents fail to demonstrate any. Instead, Respondents merely parrot the Fifth Circuit's recitation of facts from the opinion wherein, as shown in the Petition, the Fifth Circuit relied upon evidence and testimony unfavorable to Petitioner and the verdict. Notably, Respondents, like the Fifth Circuit opinion, routinely rely on the testimony of defendant Fox, who of course denied that he was motivated by retaliation. For example, Fox's testimony that his focus on science operations was his reason for adding the Ph.D. requirement, see Brief in Opposition at 14 ("Br. in Opp. at 14"), is hardly "undisputed." Petitioner put on ample evidence to controvert Fox's testimony. The jury did not believe Fox. Indeed, as mentioned in the Petition, the District Court even noted his disbelief of Fox's testimony. Pet. at 15.

Petitioner has accurately portrayed the evidence and testimony. Where there could be a question, Petitioner quoted the testimony to avoid the appearance of "spinning." Pet. at 12 (discussing a portion of the testimony of Jan Radle to demonstrate the Fifth Circuit's discounting of critical testimony). Respondents, however, accuse

Petitioner of taking testimony out of context, and then do exactly that. Despite providing it in their appendix C, Respondents ignore the final line of Radle's testimony wherein she states that it appeared *to her* as if Petitioner were being specifically targeted. Respondents nevertheless arrogantly accuse Petitioner of misleading with an out-of-context passage.

Respondents continue by providing and only addressing various excerpts of testimony while ignoring and failing to address the evidence favorable to the verdict. Where is the discussion of the rest of Chavis' testimony? She testified repeatedly that the positions were very similar and the only difference she could recall was the Ph.D. requirement. She also testified that she had questions as to "why would you create a position that has such similar duties to a position that you're laying someone off in?" As discussed above, Radle testified that it appeared to her as if Petitioner were being specifically targeted. Radle also testified that Chavis had asked Radle, "are we specifically excluding [Petitioner]?" and that Chavis had "absolutely" referred to Petitioner by name. Chavis did not deny making the comment and stated that she did not recall. Notably, she claimed that she did not recall to so many questions that the District Court took issue with her lack of recall and Respondents' failure to allow her to refresh her memory between deposition and trial.

Additionally, Respondents do not address Petitioner's widely known "frequent flyer" label or why the jury could not infer Fox's knowledge of Petitioner's protected activities from this common knowledge. Respondents do not counter that the jury can infer that the Ph.D. was a pretext when Respondents' own employees did. Instead Respondents only reargue the facts and claim that what was said was not.

Respondents attempt to reinvent the testimony of Fox regarding early drafts that he destroyed. Again, to avoid the appearance of spinning, the testimony elicited by Petitioner's counsel while taking Fox on voir dire regarding the admission of the consultant's recommendations:

Q: Did you -- do you know where the original drafts are?
A: Those original drafts do not exist.
Q: Did you destroy those original drafts?
A: I did destroy them.

The testimony was that Fox had interacted throughout and an early draft would have corroborated or refuted Fox's claim that the Ph.D. requirement had been there from the outset.

A perfect example of Respondents' attempt to mischaracterize favorable evidence is their discussion and endorsement of the Fifth Circuit's discounting of the evidence that the Ph.D. requirement was unnecessary. Like the Fifth Circuit, Respondents contend that the testimony of several witnesses that the Ph.D requirement was unnecessary is merely "disagreement" and thus "no evidence of pretext." Br. in Opp. at 14-15. However, testimony that the Ph.D. requirement is unnecessary *is evidence* that the Ph.D. requirement is unnecessary. That a requirement is unnecessary can lead to the conclusion that it is a pretext. And because we are to take evidence in a light favorable to the verdict, all testimony that the Ph.D. requirement was unnecessary supports the verdict. It is this consistent misapplication of the standard of review that warrants granting the Petition.

While taking Fox's testimony (unfavorable to the verdict) at face value, Respondents discount the testimony of Petitioner and fail to seriously address any of her relevant testimony regarding the similarity of the positions, her open assistance in making complaints, that she was told she embarrassed the organization and would never get another raise, that she did not get another raise, and that she complained directly to Fox. Respondents instead provide the botched impeachment by semantics where Petitioner admitted that she did not use certain specific words when she complained to Fox and others. Respondents again leave out critical parts of the testimony despite providing them to the Court. Contrary to Respondents' bold statement that Petitioner never testified that she complained to Fox about being paid less than white males, she testified in trial and in deposition "yes"

to the question, "Did you ever complain . . . about your pay and the fact that there was discrimination in your pay?" She answered, " . . . I complained to Jeff Fox . . ." to the follow-up question of, "To whom did you complain?" That she did not use the words, "my job is equal to this man over here and he is making more than me and that's discrimination" does not change the fact that she testified (on cross) that she complained directly to Fox about discrimination. Indeed, Respondent has provided the Court with some evidence that Fox was aware of Petitioner's protected activities.

A final dishonesty in the response must be addressed. Respondents put forth the false contention that Petitioner claimed the entire reorganization was concocted solely to get rid of her. Br. in Opp. at 11. There is nothing in the record to support this absurd contention. Petitioner pleaded and proved that Respondents used the reorganization as a pretext to terminate her. Specifically, she pleaded and proved that the addition of the Ph.D. requirement was a pretext to justify her termination. Using the reorganization as a pretext is far different than concocting the *entire* reorganization just to get rid of Petitioner. Nor does Fox's testimony that the reorganization saved money counter the truly undisputed evidence that the reorganization of Petitioner's former position did cost more. Her replacement was paid significantly more than she was, and no positions were eliminated. This semantics game of constructing a "straw dog" pleading which is then easily countered only illustrates Respondents' arrogance. Additionally, it is a new factual argument (seen first on appeal) which has no place in a proper analysis of evidentiary sufficiency under the correct standard of review.

Respondents do not oppose the Petition with any issues or contradictions of evidence that would alter the analysis. Rather they simply endorse and perpetuate the Fifth Circuit's misapplication of standard of review for which this Court reversed them in *Reeves*. Recasting of evidence in a light favorable to the losing party at trial is improper. Likewise, the disbelieved testimony of the individual found guilty of retaliation by the jury has no place in a proper analysis of sufficiency of the evidence where only the evidence favorable to the

verdict is to be considered. Respondents, like the Fifth Circuit, are conducting a *de novo* review and reargue their factual case — a case already found lacking by the jury.

II. The Question Presented is Important

Respondents contend that this case is unworthy of this Court's attention primarily arguing that it is only this case which will be affected because factual sufficiency is a case-by-case analysis. As mentioned earlier, *Reeves* itself was just such a case that Respondents argue should not be reviewed, and this Court saw the need to correct the Fifth Circuit's misapplication of the law there. Additionally, Respondents' reliance on the general principle that this Court does not review factual determinations is misplaced because this case, like Reeves, is not a question of factual determinations, but rather a misapplication of the evidentiary burden borne by plaintiffs proving their cases with circumstantial evidence. Significantly, where a Court of Appeals decides an important question in a way that conflicts with relevant decisions of this Court, review is warranted. See SUP. CT. R. 10(c).

More importantly, under Respondents' argument, the Fifth Circuit's refusal to follow Reeves would never be subject to review, regardless. Where would this leave those wrongfully discriminated against in the Fifth Circuit? Without a remedy. Thus, if not this case, then when? How many is too many? How long will the Fifth Circuit be allowed to evade review by hiding behind the guise of evidentiary sufficiency?

As to the Fifth Circuit's case history, this Court is well aware of the Fifth Circuit's opinions subsequent to *Reeves,* and Petitioner will not belabor the point beyond the cases cited as illustrations in her Petition. However, Respondents' selection of cases which they contend go against granting the Petition are worthy of discussion.

Pratt v. City of Houston, 247 F.3d 601 (5th Cir. 2001), cited by Respondents is inapposite and does not affect our analysis for two

reasons. First, it is a summary judgment case and not a review of a judgment as a matter of law following a plaintiff's jury verdict. Secondly, and more importantly, since it was but a summary judgment, the City of Houston is far from defeated. If ultimately unsuccessful before the jury of twelve at trial, the city will get yet another chance before the Fifth Circuit jury of three, who in all likelihood will either reverse the verdict or at a minimum decimate it. The *Pratt* case does demonstrate one reason these cases are so expensive. Before succeeding against a state defendant, a typical civil rights plaintiff (who usually has a 42 U.S.C. § 1983 action as well) can expect up to three trips to the Court of Appeals — once for an initial qualified immunity determination on the pleadings, again for qualified immunity at the summary judgment stage, and finally after a winning verdict.

Gee v. Principi, No. 01-50159, 2002 WL 597374 (5th Cir. Apr. 18, 2002), to which Respondents devote most of their time and attention, is likewise a summary judgment case so Gee is still far from prevailing against the Department of Veterans Affairs. Additionally and significantly, Respondents fail to mention that it was a two to one opinion with one justice dissenting. Notably, the dissent assumed the same fictional wall of silence between those with proven improper motives and the final decision maker that the Fifth Circuit assumed in the instant case,[2] and would not let the plaintiff get beyond summary judgment. *Id.* (Garza, J., dissenting). That a plaintiff occasionally survives by means of a "lucky panel" only to run the gauntlet again if successful at trial does nothing but buttress the reasons for granting this Petition.

Finally, *Oden v. Oktibbeha County*, 246 F.3d 458 (5th Cir.) *cert denied*, 122 S.Ct. 341 (2001), particularly demonstrates the chilling effect that the Fifth Circuit is having on civil rights plaintiffs. While Respondent's parenthetical that the court affirmed the jury's compensatory award is correct, what is truly significant about *Oden* is that the Fifth Circuit reversed the bulk of the jury verdict and award leaving only the $20,000 in compensatory damages for the sheriff's

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[2]See Petition at 16.

discrimination. $20,000 is hardly a victory in a case against a state which routinely costs ten times that amount to prosecute. This case illustrates Petitioner's argument that no reasonable counsel will take these cases on contingency and no honest counsel will take them for paying clients.[3]

That Respondents could not produce any, much less several, cases where the Fifth Circuit has actually affirmed a substantial jury award for a plaintiff, speaks for itself. That those cases cited demonstrate the frustration of prosecuting a civil rights action in the Fifth Circuit only reinforces the reasons for granting the Petition.

This question is important if the redress of civil rights violations is to survive in the Fifth Circuit. Neither the possibility of an award of one tenth the cost to prosecute the case, nor the false temporary victory of not being thrown out at summary judgment only to again run the Fifth Circuit gauntlet on appeal, nor the thin hope for a lucky panel alter that eventuality.

Respectfully submitted,

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[3]See Section III of Petition.